U.S. Department of Labor

Office of Administrative Law Judges
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AMENDED[1] RECENT *SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 151*
December 2000 - February 2001

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. Court of Appeals

[Ed. Note: The following circuit case has been included for informational value as it may relate to issues of SAE and determining levels of economic disability.]

Willis v. Pacific Maritime Association,et al., ___ F.3d ___ (Docket No. 97-16778 and 97-16779) (9th Cir. 2001).

Here, the Ninth Circuit took up the conflict between the ADA and seniority provisions of collective bargaining agreements in *Willis v. Pacific Maritime Association, et al.*, No. 97-16778 and *Gomez v. Pacific Maritime Association, et al.*, No. 97-16779. Willis and Gomez were both longshore workers on the docks in the San Francisco Bay area and members of the International Longshore and Warehouse Union local (the Union). The Union, in turn, was party to a collective bargaining agreement (CBA) with the Pacific Maritime Association, a trade association of the main employers of dockworkers (the Association). Under the agreement, Union workers report each day to a central hiring hall jointly maintained by the Union and the Association and are assigned to available longshore jobs based on seniority. The system also includes provisions for priority assignment of older and disabled workers to light duty positions. The collective bargaining agreement also governed the transfer of employees from the longshore union to the local marine clerks union.

Plaintiffs, Willis and Gomez, were disabled in the course of their employment under the CBA. Each sought light duty assignments, transfer to the clerks union, or both as a result of their disability. Their requests were denied based on seniority. Plaintiffs sued the Union and Association separately in District Court and the cases were consolidated and ultimately dismissed on summary judgment in favor of the Union and Association. Plaintiffs contended that the defendants

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[1] This version of the *Recent Significant Decisions* contains corrected longshore digests. Discard the prior version of Digest No. 151.

discriminated against them by failing to make reasonable accommodation for their disabilities as required by the ADA. On appeal, the Ninth Circuit affirmed, holding that "[a] plain reading of the ADA supports the conclusion that an accommodation that would compel an employer to violat a CBA is unreasonable." *Id.* at 343. The circuit court also found that "the operation of a bona fide seniority system is not discriminatory simply because it does not allow for the accommodations which would upset the operation of the seniority system itself." *Id.* at 344.

B. Benefits Review Board Cases

Brad Valdez and Joshua Valdez (Children of Manuel Valdez, Jr.) V. Crosby & Overton et al, ___ BRBS ___, (BRB Nos. 99-0960 and 99-0960A) (2001).

Upon reconsideration the Board determined that Employer was entitled to credit for overpayment of compensation to Brad Valdez. The Board further held that this credit could be applied against future compensation owed to Brad's brother Joshua. Claimant's relied on the Board's decision in *Gilliland v. E.J. Bartells Co., Inc.*, 34 BRBS 21 (2000) and argued that Employer was not entitled to apply the credit to future payments owed to Joshua since the Employer made no attempt to recover the overpayment prior to Brad's 23d birthday. The Board declined the motion for reconsideration. It distinguished the instant case from *Gilliland* saying that the *Gilliland* decision relied on the credit provision at Section 33(f) while the instant case relied on the credit provision at Section 14(j). 33 U.S.C. § 914(j). The Board allowed the employer to apply the credit against future compensation owed to the other son because 14(j) allows employer's to receive a credit for their prior payments against an compensation subsequently found due. The Board also reasoned that because Section 9(b) allows for payment of one death benefit to a spouse including additional compensation for surviving children, the compensation owed to Josh Valdez was subsequent compensation due under the same award as that paid to Brad Valdez.

[Topic 14.5 **Employer Credit for Prior Payments**; Topic 9.3 **Survivors**]

Martin v. Pride Offshore, Inc, ___ BRBS ___ (BRB No. 99-0398)(2001).

At issue here is whether a claimant injured in a car accident while returning home from his workplace could claim coverage under the provisions of the LHWCA as extended by OCSLA. The parties to *Martin v. Pride Offshore, Inc.*, BRB No. 99-0398, originally contested whether or not Claimant's car accident was the cause of his disability. Claimant worked on Employer's platform on the Outer Continental Shelf off Louisiana. After a seven day hitch on the platform, Claimant was flown by helicopter to his car and began to drive to his home in Alabama. During the course of the drive, Claimant was involved in a one car accident and was severely injured including sustaining memory loss. The ALJ originally found that Claimant's disability was the result of an injury in the form of fatigue suffered during his seven day work shift. The judge held that because the fatigue happened during the shift on the platform it met the OCSLA situs requirements. The Board reversed, holding on appeal that because the car accident occurred on a highway in Mississippi, *Mills v. Director, OWCP*, 877 F.2d 356 (5th Cir. 1989) precluded the finding that the OCSLA situs

requirement was satisfied.

[Topic 60.3.2 **OCSLA Coverage**]

James Benjamin v. Container Stevedoring Co., et al., ___ BRBS ___, (BRB Nos. 00-0414 and 00-0414A)(2001).

The Director appealed the findings of the ALJ that SSA, a subsequent employer was responsible for Claimant's hearing loss. The Director contended on appeal that the ALJ should have found Container Stevedoring, Claimant's original employer, liable in part based on the level of impairment reflected in the Claimant's first audiogram. The Director argued that because there were two injuries and two audiograms, the ALJ had erred in treating the second audiogram as dispositive and holding only the second employer responsible. SSA, the subsequent employer joined in the appeal supporting Director's contention. The Board, citing *inter alia, Travellers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), affirmed the ALJ. The Board held that because both claims involved hearing loss injuries the ALJ properly treated them as one injury and not two. On that basis, the Board explained, the responsible employer is the employer during the last employment where Claimant is exposed to injurious stimuli. Accordingly, SSA, as the last employer was properly held liable for the entire injury.

[Topic 8.13.4 **Responsible Employer and Injurious Stimuli**; 8.13.8 **Hearing Loss and Proving Disability at Last Exposure**]

William Brown v. National Steel and Shipbuilding Co., ___ BRBS ___, (BRB No. 00-0419)(2001).

Here, the Board addressed the question of whether temporary total disability compensation is available while Claimant is participating in a vocational rehabilitation program. Additionally the Board considered whether Claimant could receive temporary partial disability compensation based upon wages he actually earned during part-time employment as an Instructional Aide and the award of permanent partial disability compensation for a 28% impairment to Claimant's arms. The Claimant, a journeyman shipfitter had suffered from carpal tunnel as a result of repeated stresses of his job. The Board affirmed the decision of the ALJ on all but the issue of whether Claimant could receive partial disability payments based on his part-time employment.

Employer argued that *Louisiana Ins. Guaranty Association v. Abbott*, 40 f.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993), should not be controlling since, (1) the Claimant was participating in a state-sponsored vocational rehab program; (2) unlike Abbott, the instant case involves an injury under the schedule, and vocational training will not reduce Employer's ultimate liability; and (3) Claimant should be found capable of performing part-time employment during the period of his retraining.

In ruling that *Abbott* did apply, the Board rejected each of Employer's arguments; first, the Board noted that the Ninth Circuit has recognized the LHWCA's interest in facilitating the

rehabilitation of injured employees. Second, the Board found that Employer's interests were, likewise, furthered as a result of Claimant's retraining program since Claimant's acquired skills reduces the likelihood that Claimant would be unable to obtain SAE and thus render employer liable to Claimant for total disability compensation.

Third, the Board affirmed the ALJ's conclusion that Claimant was incapable of working part-time during his participation in a vocational rehabilitation program. In so doing, the Board noted that Claimant's retraining program was suspended by his instructors during his period of part-time employment as an instructional aide, and this suspension suggests that Claimant's vocational rehabilitation counselors did not believe that he was capable of both participating in his vocational retraining and performing a part-time job. Additionally, Claimant testified that he was exhausted at the end of each retraining day and the Board felt that the ALJ was correct in determining that it was unreasonable to expect Claimant to arise at 5:30 a.m., attend both classroom work and hands-on training from 7 a.m. until 1 p.m. and then commence part-time employment. Finally, the Board noted that Claimant underwent dual carpal tunnel releases during the period of time and that these too surgical interventions resulted in Claimant's inability to attend his retraining sessions for several weeks.

As to the second issue, the Board agreed with Employer, holding that temporary partial disability should be based on the difference between Claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. The Board vacated the ALJ's award of benefits based on Claimant's actual post-injury earnings because it found that the ALJ had failed to consider Employer's evidence to determine whether those wages fairly and accurately represented Claimant's current wage earning capacity. The Board held that this was a necessary step under *Container Stevedoring Co. v. Director, OWCP,* 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); *Cook v. Seattle Stevedoring Co.* , 21 BRBS 4 (1988).

[Topic 8.2.3.2 **Disability While Undergoing Vocational Rehabilitation**; 8.9.1 **Wage-Earning Capacity Generally**; 8.9.3.1 **What Consitutes "Actual Wages"**]

Beckner, Jr. v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 00-0370)(2000).

In reversing a Section 8(f) award, the Board found that Claimant's pre-existing bilateral amputations did not cause his asbestosis impairment to be substantially greater than that which would have resulted from the asbestos exposure alone. Claimant and Employer had agreed that Claimant's present permanent partial disability as a result of his asbestosis is 25%. In his decision, the ALJ explicitly determined that a physician had quantified claimant's impairment from asbestosis alone at 25 %. The Board found it axiomatic that the ultimate permanent partial disability did not materially and substantially exceed the disability that would have resulted for the injury, viz., Claimant's asbestosis. Another physician had reviewed reports and concluded that Claimant's overall disability was not caused by asbestosis alone. (He listed cardiovascular disease and diabetes as significant contributing factors). Specifically, he opined that Claimant's overall impairment rating

would have been 15 % but for the asbestosis. However, the Board found that the ALJ had properly given that opinion no weight since it was calculated by a method of analysis explicitly rejected by the case law.

[Topic 8.7.6 **Section 8(f) Relief–In Cases of Permanent Partial Disability**]

Fitzgerald v. Stevedoring Services of America, ___ BRBS ___, (BRB No. 00-0724)(Jan. 31, 2001).

This is the appeal of a bifurcated proceeding, wherein the sole issue before the ALJ was whether there was an employer-employee relationship between a stevedoring company (SSA) and a claimant who worked for the Georgia Ports Authority (GPA), a subdivision of the State of Georgia. Pursuant to a leasing arrangement known as "the tariff," GPA leases its equipment and equipment operators to stevedoring companies.

Before addressing the matter on the merits, the Board first addressed Claimant and Director's motion to dismiss the appeal as not timely. The Board stated that, while it generally does not entertain appeals from interlocutory orders, it has the discretion to do so. To support this position, the Board cites Section 21(b)(2) of the LHWCA, which provides that the Board is authorized to hear appeals "raising a substantial question of law or fact taken by any party in interest..."

Next, the Board addressed the stevedoring company's argument that Claimant is excluded from coverage under the LHWCA by operation of Section 3(b), inasmuch as claimant was, at the very least, the nominal employee of GPA, a government subdivision. SSA and its amicus intervener, the National Association of Waterfront Employers (NAWE) claimed that Section 3(b) prevents liability from being shifted from a governmental subdivision to a statutory employer, and therefore, the borrowed employee doctrine should not be applicable in this case.

The Board permitted the raising of Section 3(b) for the first time on appeal noting that it has previously held that it will permit a party to raise an issue for the first time on appeal where a pertinent statutory provision has been overlooked.

The Board held that Section 3(b) concerns the immunity of government entities from liability under the LHWCA, and does not prevent a nominal state employee from becoming the borrowed employee of a statutory employer under the LHWCA. In so holding, the Board was guided by the language of Section 4(a) of the LHWCA, which provides: "*Every* [Emphasis added by the Board in its quote of the subsection.] employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title."" Thus, the Board reasoned, under Section 4(a), all employers, including borrowing employers, are liable for compensation under the LHWCA.

Thus, the Board determined that Section 3(b) does not prevent a finding that SSA was Claimant's borrowing employer; rather, a determination as to whether Claimant is excluded from coverage under Section 3(b) is dependent on whether the ALJ properly determined that SSA was

Claimant's borrowing employer at the time of his injury. In upholding the ALJ's finding of borrowed employee status, the Board distinguished *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909) and analyzed the ALJ's application of the "Ruiz-Gaudet borrowed employer test". This nine-part test to determine the responsible employer in a borrowed employee situation was developed by the Fifth Circuit in *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), and *Gaudet v. Exxon Corp*., 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). It has been applied by the Board previous to the present case.

[Topics 21.1.2 **Review of Compensation Orders–Grant of Authority**; 3.1 **Coverage–Government Employees**; 2.2.16 **Borrowed Employee Doctrine**; 75.0 **Employer-Employee Relationship**; 4.1.1 **Employer Liability–Borrowed Employer doctrine**]

II. Black Lung Benefits Act

[**NOTE**: A revised schedule for the submission of pleadings in *National Mining Ass'n. v. Elaine L. Chao* is attached. The *Preliminary Injunction Order* issued by District Judge Sullivan on February 9, 2001 is still in effect.]

Benefits Review Board

In an unpublished decision, *Villian v. Zeigler Coal Co.*, BRB No. 00-0451 BLA (Jan. 29, 2001), the Board upheld the administrative law judge's application of collateral estoppel to preclude Employer from re-litigating the existence of pneumoconiosis and its etiology in a survivor's claim where a finding of coal workers' pneumoconiosis was made in the prior living miner's claim. Employer had argued that a survivor's claim is analogous to a duplicate claim under § 725.309 as it is decided "entirely independent from the miner's claim." The Board disagreed to state the following:

> First, the existence of pneumoconiosis was raised in the present survivor's claim and actually litigated in the prior proceeding on the miner's claim. Second, the determination of the existence of pneumoconiosis was necessary to the previous miner's award of benefits, unlike the denial of benefits in *Hughes*,[2] inasmuch as the presence of pneumoconiosis pursuant to Section 718.202(a) is a requisite element of entitlement to benefits in a Part 718 case. (citations omitted). Third, the prior proceeding resulted in a final judgment on the merits inasmuch as the Board affirmed Administrative Law Judge Mills' Decision and Order awarding benefits, which employer did not pursue, and the miner's claim was in payment status until his demise. Finally, employer had a full and fair opportunity to litigate this issue in the prior miner's claim. (citation omitted). Additionally, the evidence of record in the instant case contains no autopsy evidence, hence, an exception does not apply.

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[2] The complete citation is *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134 (1999) (en banc).

> Accordingly, we hold that collateral estoppel, or issue preclusion, applies to the instant survivor's claim, employer is collaterally estopped from relitigating the issue of the existence of pneumoconiosis, and the existence of pneumoconiosis is established as a matter of law. (citations omitted).

Slip op. at 5.

[**application of collateral estoppel to preclude re-litigation of pneumoconiosis in survivor's claim**]

By unpublished decision in *Hilliard v. Old Ben Coal Co.*, BRB No. 99-0933 BLA (June 30, 2000), the Board affirmed an administrative law judge's exclusion of evidence supporting Employer's petition for modification as it "could have been obtained before the miner's claim for benefits was adjudicated or when employer's first request for modification was before Judge Burke." In addition, the Board concluded that:

> . . . the administrative law judge properly extended this reasoning to employer's request for permission to obtain the report of the miner's autopsy. The miner died two years before Judge Burke's denial of employer's first petition for modification. Thus, employer could have sought and submitted this report at an earlier juncture.

Slip op. at 6. The Board also held that the administrative law judge properly held Employer to be bound by the acts of its attorney who, without Employer's knowledge, abandoned his law practice:

> Apparently without notice to employer, employer's counsel, Wayne R. Reynolds, abandoned his law practice at some point during the consideration of employer's first request for modification, which was denied by Judge Burke. Employer asserts that under these circumstances, it would be unjust to allow an award of benefits when the evidence of record clearly does not support a finding of entitlement. We reject employer's argument, as the general rule is that a party is bound by the actions of its attorney, no matter how negligent or incompetent, and that a party dissatisfied with the actions of its freely chosen counsel has a separate action against such counsel in another forum for his negligence. (citations omitted).

Slip op. at 5-6.

[**exclusion of evidence on modification; party bound by acts of attorney**]

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February 16, 2001

TO: John M. Vittone
Chief Judge

Thomas M. Burke
Associate Chief Judge

FROM: Seena Foster
Legal Counsel

RE: **AMENDED** Briefing schedule in black lung proceedings before U.S. District Judge Sullivan
United Mining Ass'n. v. Elaine Chao, Secretary of Labor

Department of Labor's administrative record copied, certified, and delivered to Plaintiff and Intervener	Friday, February 16
Motions and objections to administrative record filed by Plaintiff	Friday, February 23
Oral hearing to resolve all issues regarding content of administrative record	Friday, March 2 10:00 a.m.
Plaintiff's brief due	Thursday, March 29
Defendant's brief due	Monday, April 23
Intervener's brief due	Monday, April 30
Responses from all parties due	Monday, May 7
Replies from all parties due	Thursday, May 10
Proposed findings to be filed by all parties	Monday, May 14
Oral argument on consolidated case (preliminary injunction and merits)	Monday, May 21 10:00 a.m.

Judge Sullivan stated that he would issue a written decision within one week. He left the *Preliminary Injunction Order* in place despite UMWA's arguments. However, he indicated that he would revisit the question in 30 days after the parties were able to determine what type of impact the *Order* had on proceedings pending before the OALJ.